

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2010 MSPB 39

Docket No. DC-0752-09-0762-I-1

**Jeanne Mfotchou,
Appellant,
v.
Department of Veterans Affairs,
Agency.**

February 19, 2010

Jeanne Mfotchou, Bladensburg, Maryland, pro se.

Rebecca Gage Bailey, Esquire, Baltimore, Maryland, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed her appeal for lack of jurisdiction. For the reasons discussed below, we GRANT the petition for review under [5 C.F.R. § 1201.115](#)(d) and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING the appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant, a registered nurse since June 2006, tendered her resignation with an effective date of August 29, 2007. Initial Appeal File (IAF), Tab 9 at

4-7. She thereafter filed a Board appeal, apparently claiming that she was wrongfully terminated and that the agency discriminated against her on the basis of her race, age or gender. IAF, Tab 1.

¶3 The agency submitted a response in which it argued, *inter alia*, that the Board had no jurisdiction to hear the appeal because the appellant was appointed under [38 U.S.C. § 7401](#)(1), and therefore lacked Board appeal rights under 5 U.S.C. chapter 75. IAF, Tab 7, Subtab 1 at 1.

¶4 The administrative judge issued a jurisdictional order advising the appellant, among other things, that medical professionals appointed under 38 U.S.C. chapter 74 do not have the right to appeal removals directly to the Board. IAF, Tab 8 at 1. Noting that the appellant bears the burden of proving jurisdiction, the administrative judge ordered her to submit evidence and argument explaining why the Board has jurisdiction over her appeal. *Id.* at 2. The order stated that the appellant’s “submission must be filed so that it is received by September 23, 2009,” and that the record on the jurisdictional issue would close on that date. *Id.* at 2-3.

¶5 The agency submitted a response to the order which included a Standard Form (SF) 52, Request for Personnel Action, indicating that the appellant was to receive an excepted appointment under [38 U.S.C. § 7405](#)(a)(1) on a temporary full-time basis. *See* IAF, Tab 9 at 7.¹ On or about September 20, 2009, the appellant submitted by facsimile to the administrative judge a response entitled “Argument about the Board’s Jurisdiction,” which was scanned into the Board’s electronic filing system but appears to have been inadvertently excluded from the appeal file. Petition for Review File (PFRF), Tab 8.

¹ We note that the SF-50 documenting the appellant’s appointment is not part of the record. The agency stated below that although it had recalled the appellant’s Official Personnel Folder from the archives, that SF-50 could not be located. IAF, Tab 9 at 2.

¶6 In her initial decision, the administrative judge dismissed the appeal for lack of jurisdiction, finding that as an appointee under [38 U.S.C. § 7405\(a\)\(1\)](#), the appellant was not an “employee” entitled to appeal her removal under 5 U.S.C. chapter 75. IAF, Tab 10, Initial Decision (ID) at 2-3. In light of that finding, the administrative judge also determined that the Board lacked jurisdiction to consider whether the appellant’s resignation was involuntary and therefore tantamount to a removal. ID at 2-3. The initial decision does not state whether, in determining to dismiss the appeal, the administrative judge considered the appellant’s submission on the jurisdictional issue.

¶7 The appellant has timely filed a petition for review, and the agency has filed a response in opposition to it. PFRF, Tabs 1, 7.

ANALYSIS

¶8 Generally, an involuntary resignation is appealable to the Board as an adverse action under 5 U.S.C. chapter 75. *See Falso v. Office of Personnel Management*, [77 M.S.P.R. 207](#), 210 (1997). Only an “employee,” as defined under 5 U.S.C. chapter 75, subchapter II, however, can appeal to the Board from an adverse action. *See* [5 U.S.C. §§ 7511\(a\)\(1\), 7512\(1\)](#). This right of appeal does not accrue to an individual “who holds a position within the Veterans Health Administration which has been excluded from the competitive service by or under a provision of title 38, unless such employee was appointed to such position under section 7401(3) of such title.” 5 U.S.C. § 7511(b)(10).

¶9 The record indicates that the appellant held a position in the Veterans Health Administration at the time of her separation. That is, she was appointed under [38 U.S.C. § 7405\(a\)\(1\)](#), as indicated above, and that section governs appointments in the Veterans Health Administration, *see* [38 U.S.C. §§ 7401-11](#). Moreover, 38 U.S.C. § 7405(a) provides that the agency

may employ, without regard to civil service or classification laws, rules, or regulations, personnel as follows:

(1) On a temporary full-time basis, part-time basis, or without compensation basis, persons in the following positions:

(A) Positions listed in section 7401(1) of [title 38].

The appellant's position of registered nurse is listed in section 7401(1) of title 38, and not in section 7401(3).

¶10 In her petition for review and in subsequent submissions, the appellant complains that the administrative judge failed to consider her submission on jurisdiction. PFRF, Tabs 1, 5-6. The initial decision does not indicate whether the administrative judge considered the appellant's submission on jurisdiction, as stated above, and in fact the record does not indicate whether she was even aware that the submission was filed. For this reason, and because the submission was timely filed, we have considered it on review. *See Harrell v. U.S. Postal Service*, [112 M.S.P.R. 492](#), ¶ 10 (2009).²

¶11 Although the appellant's submission on jurisdiction sets forth her general observations on the nature of justice and the judicial process, it does not address the issue of whether the provisions quoted and described above preclude Board jurisdiction over this appeal. *See* PFRF, Tab 8. It also does not otherwise identify any specific support for a finding that the Board has jurisdiction over the appeal. Because the appellant held "a position within the Veterans Health Administration which has been excluded from the competitive service by or under a provision of title 38," we find that section 7511(b)(10) of title 5 bars her involuntary resignation appeal. *See Khan v. United States*, [201 F.3d 1375](#), 1380-

² The appellant also contends on review that the administrative judge erred in failing to consider her responses to the agency's interrogatories. PFRF, Tab 6 at 3; *see* IAF, Tab 12. These responses are dated September 28, 2009, and accordingly could not have been filed until after the September 23, 2009 deadline identified in the jurisdictional order had passed and the record had closed. IAF, Tab 12 at 1. Thus, the administrative judge did not err in failing to consider them. In any event, the appellant's interrogatory responses address the merits of her claims and not the dispositive jurisdictional issue.

81 (Fed. Cir. 2000); *Pichon v. Department of Veterans Affairs*, [67 M.S.P.R. 325](#), 326-27 (1995) (the appellant's position as a registered nurse was excluded from coverage under subchapter II of chapter 75 by [5 U.S.C. § 7511](#)(b)(10) because it was excluded from the competitive service by or under a provision of title 38). The appellant's exclusive remedy is therefore before the agency, *see* [38 U.S.C. §§ 7461-64](#); *see also Khan*, 201 F.3d at 1381-82, and the Board lacks jurisdiction to consider the merits of her appeal.

¶12 Accordingly, we DISMISS the appeal for lack of jurisdiction.

ORDER

¶13 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113](#)(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.